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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MINNESOTA MINING AND MANUFACTURING COMPANY,

Respondent,

vs.

WALTER S. BLUME and THE ELECTRODYNE COMPANY, INC.,

Petitioners.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR CERTIORARI

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March 22, 1983

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QUESTIONS PRESENTED

I. Where the district court declared in the written opinion it was unable to find any evidence in the record concerning the nature and operation of the defendant's trade secret when in fact such evidence was fully disclosed in videotapes of the trade secret process admitted in evidence as well as being orally explained in a sealed deposition to which the court's attention was directed, does the failure of the court to view the videotapes or to read the sealed deposition constitute a denial of due process?

II. Where the district court declared in the written opinion it was unable to find any evidence in the record concerning the nature and operation of the defendant's trade secret when in fact such evidence was fully disclosed in videotapes of the trade secret process admitted in evidence as well as being orally explained in a sealed deposition to which the court's attention was directed does the failure of the court to view the videotapes or to read the sealed deposition constitute clearly erroneous conduct?

III. Where the court finds certain terms in a written release to be ambiguous is it clearly erroneous to construe the perceived ambiguous terms contrary to their plain meaning and most strongly in favor of the one who drafted the written release?

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PETITION FOR CERTIORARI

OPINIONS

The subject matter of the three Questions Presented was considered in two opinions of the District Court as the result of a bifurcated trial, and one opinion of the Court of Appeals, which considered consolidated appeals of Petitioners (hereinafter collectively, Mr. Blume) and of Respondent (hereinafter, 3M). The appeals of both parties were the subject of separate orders of the Court of Appeals denying respective petitions for rehearing. Mr. Blume's

appeals were designated in the Court of Appeals as No. 80-3262 and No. 80-3585.

Appeal No. 80-3262 concerned the trade secret defense relating to the herein first and second Questions Presented. Appeal No. 80-3585 concerned the written release to practice the patents in suit, the third Question Presented. The relevant Opinions and Orders are reproduced in the Appendix to the 3M petition for certiorari, No. 82-1223:

1. Opinion of the United States Court of Appeals for the Sixth Circuit, filed July 7, 1982 and reported in 683 F.2d 1166 (App. No. 82-1223 – A1);
2. Order of the United States Court of Appeals for the Sixth Circuit, filed December 23, 1982 (App. No. 82-1223 – A16);
3. Findings of Fact and Conclusions of Law on the bifurcated trial relating to the contract matter of release, June 1, 1978 (App. No. 82-1223 – A24);
4. Order on the bifurcated trial, June 1, 1978 (App. No. 82-1223 – A23);
5. Findings of Fact and Conclusions of Law, relating to the patent and trade secret matters, August 7, 1979 (App. No. 82-1223 – A87);
6. Order on the patent and trade secret matter, August 7, 1979 (App. No. 82-1223 – A85);
7. Order, August 22, 1980 (App. No. 82-1223 – A146);
8. Judgment on the District Court, August 22, 1980 (App. No. 82-1223 – A147);
9. Judgment in the Court of Appeals, July 7, 1982 (App. No. 82-1223 – A148);
10. Order of the Court of Appeals for the Sixth Cir-

cuit Denying Rehearing, December 23, 1982 (Included Supplemental App. 1a).

Deferred Appendix

Portions of the cited record not herein included are contained in the Petitioner's Deferred Appendix (Pet. Def. App.) which is deferred consistent with the Rules of the Supreme Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 1982 (App. No. 82-1223 A147); petition for rehearing was denied on December 23, 1982 (Included Supplemental App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

The case concerns the claimed infringement of two patents; U.S. Patent 3,235,675 ('675, a product patent) and U.S. Patent 2,999,275 ('275, a process patent). The defenses raised to the claimed infringement were a written release to make and sell the produce, Matrix Bonded Permanent Magnets, as defined in the release, and a trade secret process which avoided the claims of the '275 process patent. There was a bifurcated trial. The written release was tried first, on the possibility that there might be disposition of all issues before the district court and thereby render moot the alleged patent infringement issues.

The district court found certain terms in the written release to be ambiguous and construed the release in favor of 3M, the drafter of the release. At the second trial, more than a year later, the court found the '675 product

patent to be invalid. That matter is now before this Court on a petition for writ of certiorari (No. 82-1223). The trial court further declared it was unable to find any evidence which either explained the trade secret or why, ". . . (whatever it is) produces the effect defendants claim it produces." (App. No. 82-1223 — A140, fn. 23). The court therefore concluded Mr. Blume had literally infringed the 3M '275 process patent.

REASONS FOR GRANT OF WRIT

The case is of fundamental importance because crucial evidence which the district court believed did not exist was in fact admitted in evidence but never viewed or read by the district court. The inability of the trier of fact to locate and therefore consider such evidence constitutes a denial of due process.

Both the First Question and the Second Question arise from the same circumstances and therefore are treated together throughout this petition.

I. THE FAILURE BY THE DISTRICT COURT TO CONSIDER EVIDENCE SUBMITTED BY MR. BLUME ON A POINT THE COURT CONSIDERED CRITICAL, DENIED TO MR. BLUME A MEANINGFUL OPPORTUNITY TO BE HEARD ON THE DETERMINATIVE FACTUAL ISSUE, IN VIOLATION OF THE FUNDAMENTAL FAIRNESS REQUIRED OF THE DUE PROCESS CLAUSE.

The '275 process invention mechanically aligned microscopic magnetic particles of barium ferrite in a rubbery material by either special extruding or special rolling to produce a high energy magnet of great utility. The invention was a substantial commercial success.

Years later Mr. Blume discovered quite by accident (Pet. Def. App.) that these microscopic plate-like particles of barium ferrite could also be mechanically aligned within the rubber-like matrix when mixed with the matrix in an intensive mixer, called a Banbury, which he had specifically mofidied. The modified Banbury produced irregular pieces of material of varying size each containing thousands of the plate-like particles aligned with each other in parallel planes.

A micropulverizer then chopped the irregularly shaped pieces of material from the Banbury into pieces of a more uniform size. Those pieces of material were thereafter aligned *magnetically* with each other before rolling into sheet form. An ordinary rolling step, with ordinary rubber processing equipment, was used to produce a sheet of material. The trade secret process did not *mechanically* align the particles within the matrix by either method claimed in the '275 patent.

The trade secret process was videotaped by 3M under a protective order in its plant inspection of Electrodyne on July 20, 1979. The district court received those videotapes in evidence (DX 588; 589) to be viewed at its later convenience. Mr. Blume also orally explained the trade secret process in two volumes of his deposition taken *in camera* and filed by 3M with the Court under seal. The sealed deposition was specifically referred to and directed to the district court's attention during the second trial (Pet. Def. App.). Excerpted parts of the deposition dealing with other aspects of the trade secret process, but not the micropulverizer step, were handed to the district court by 3M counsel before closing argument and by Mr. Blume's counsel after closing argument. Throughout the second trial all parties treated the sealed testimony as necessarily presented to the court in that convenient form in the attempt to make economic use of the district court's time.

The district court in the second trial received in evidence the results of tests made by Mr. Blume which demonstrated that the microscopic particles of barium ferrite were aligned in the rubber-like matrix during the mixing stage of the trade secret process, and not as the result of either method claimed in the '275 process patent. But the district court, in the opinion (App. No. 82-1223 — A142) concluded these important tests were misleading and rejected them, adopting the criticism of those tests made by the 3M expert, Dr. Strnat.

Dr. Strnat testified that the alignment tests offered by Mr. Blume were meaningless because the material used for the tests had been subjected to size reduction in the micropulverizer which he believed was not used in the trade secret process. Obviously 3M had not informed Dr. Strnat that Mr. Blume did in fact use the micropulverizer in the

commercial application of the trade secret process. Otherwise Dr. Strnat could not have responded as he did on cross examination:

> A. . . . I am absolutely convinced that the finely pulverized material (from the micropulverizer) has a better alignment within each granule, is much more readily alignable by a magnetic field (parenthetical supplied) . . . .
>
> Q. And if Mr. Blume at Electrodyne uses a pulverizer in his commercial process, then is it your testimony, sir, that that will even enhance further the alignment of the particles from the Banbury?
>
> A. If you were to use this finely pulverized granulet in your commercial process, yes, then the test you have done is a fair test, but this is not what we would hope. (Pet. Def. App.).

Had the district court viewed the video taped evidence which it admitted (DX 588, 589) or read and considered *all* of the sealed testimony of Mr. Blume, it would have known Dr. Strnat's assumption was in error. The district court, had it considered the videotaped evidence, could not have concluded:

> Defendants attempted to deflect the damaging nature of this testimony by implying that, if Mr. Blume uses a micropulverizer in his TSP, that this would "enhance even further the [magnetic] alignment of the particles [sic] from the Banbury" (Tr. 1319). This attempt however serves as an example of the chemeleon-like quality of Mr. Blume's defenses of the 275 issue. The testimony was undisputed that no micropulveriser was used in the Blume TSP (Tr. 43-53; PX 803) (A 751). (App. No. 82-1223 — A142).

II. AT THE FIRST TRIAL THE DISTRICT COURT DID NOT HAVE AN UNDERSTANDING OF THE SCOPE OF THE PATENTS INVOLVED AND ERRONEOUSLY CONSTRUED THOSE PARTS OF THE WRITTEN RELEASE WHICH IT FOUND AMBIGUOUS, MOST STRONGLY AGAINST MR. BLUME AND MOST FAVORABLY FOR THE DRAFTER, 3M, TO THE SUBSTANTIAL PREJUDICE OF MR. BLUME.

In July 1975 Mr. Blume began to make the product he was released to make but did so by the trade secret process. Because of the district court's preliminary injunction, which it subsequently removed, Mr. Blume continued to use the trade secret process for an additional period of time, when by the written release, he was otherwise permitted to practice the unexpired 275 process patent.

Counsel for Mr. Blume believed a bifurcated trial held the substantial potential that a later trial on the complicated patent issues would be unnecessary. The rationale was that if Mr. Blume was successful on the contract issue of written release from the earlier non-competition agreement to make and sell the product, the alleged infringement issues would be moot. Unfortunately, the district court, without a clearer understanding of the scope of both patents gained subsequently at the second trial, mistakenly determinated parts of the written release to be ambiguous and erroneously construed these terms most strongly in favor of the drafter, 3M. *Smith* v. *The Elizabeth Jenning Home,* 176 Ohio St. 351 (1964); *Cepponi* v. *Sunshine Biscuit, Inc.,* 652 F.2d 643, 649 (6th Cir. 1981). The district court then found Mr. Blume was not released to make and sell the magnet defined in the written release. The district

court also found that release proviso of the written agreement was only an extension of Mr. Blume's earlier non-compete agreement. (App. No. 82-1223 – A72).

The district court, despite the contrary testimony of the former general counsel for 3M, adopted 3M's interpretation-for-trial of the release in the letter agreement which it drafted, namely, to give "3M 'two strings to its bow' in tort and contract to sue Mr. Blume should he infringe his patents prior to May 1, 1976" (App. 82-1223 – A51).

But the testimony on cross examination of two important witnesses for 3M confirmed that the district court's findings was contrary to the intentions of 3M when it granted the release to Mr. Blume. (Pet. Def. App.)

Mr. Abbott, former general counsel and also a director of 3M, testified that on June 26, 1972 3M released Mr. Blume to make the magnets which 3M was making under its '275 process patent with the qualification that Mr. Blume would especially not infringe the '275 process patent prior to May 1, 1976 (App. No. 82-1223 – A-57-59, fn. 30; Pet. Def. App.); two years and four months before it would expire on September 12, 1978. Mr. Abbott reemphasized that Mr. Blume was released in 1972 to make those magnets by any non-infringing process, stating, "That was okay, and I believe they (3M) thought there was a good chance he would . . ." (parenthetical supplied; Pet. Def. App.).

The district court "found this dispute a difficult one to resolve" because 3M's interpretation "puts a strain on the language. (App. No. 82-1223 – A41). The district court was "unclear why it was necessary for 3M to resort to such a complicated process of reasoning in order to protect rights which 3M already had under the Blume patents" and it

"would have been much less complicated . . . for 3M to release any magnets he wanted so long as he did not infringe his patents – *period*" (App. No. 82-1223 – A51).

CONCLUSION

We suggest the primary reason for the writ to issue resides in the constitutional considerations raised in the petition.

The Fifth Amendment to the United States Constitution provides, *inter alia* that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The concept of due process is not one easily defined or delineated. It expresses the principal, fundamental to our constitutional system, that the actions of government, including judicial proceedings, must be carried out in a manner that is "fundamentally fair." *Lassiter* v. *Department of Social Services,* 452 U.S. 18, 24 (1981); *Kinsella* v. *United States,* 361 U.S. 234 (1960); *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960). This Court has stated, "[t]he touchstone of due process is protection of the individual against arbitrary action of government. . . ." *Wolff* v. *McDonnell,* 418 U.S. 539, 558 (1974).

The requirements of due process are not susceptible to rigid or mechanical formulations. *Hannah* v. *Larche, supra.* Rather, due process is a flexible concept, and one that demands "such procedural protections as the particular situation demands." *Smith* v. *Organization of Foster Families for Equality & Reform,* 431 U.S. 816, 848 (1977); *Morrisey* v. *Breuer,* 408 U.S. 471, 381 (1972). It is possible, however, to discern some of its parameters. This Court has held that "due process requires, at a mini-

mum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie* v. *Connecticut,* 401, U.S. 371, 377 (1971); *see also Little* v. *Streater,* 452 U.S. 1, 16 (1981). The Court has described a "full hearing [as] one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety . . . of the step asked to be taken." *Akron, Canton & Youngstown Railway Co.* v. *United States,* 261 U.S. 184, 200 (1922). "The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause." *Jenkins* v. *McKeithen,* 395 U.S. 411, 429 (1969); *see also United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 (1938). It is too apparent to warrant extended argument that the right to introduce evidence is rendered meaningless if the district court because of its own inadvertence cannot locate and therefore does not consider the only critical evidence directly on point to a determinative issue. This Court has held that the exclusion of critical evidence may violate the requirements of due process. *Chambers* v. *Mississippi,* 410 U.S. 284 (1973). The district court held, on the point it considered determinative, there was no evidence in the record explaining Mr. Blume's trade secret process or its effects (App. No. 82-1223 – A140, fn. 23; A142) despite the demonstrable fact that such evidence was in the record but was never examined or considered by the court. For this Court to distinguish this situation from one in which the trial court refused to admit the evidence *ab initio* would be to exalt form over substance. Petitioner has been denied a meaningful opportunity to be heard on this crucial point, and has

been denied due process of law in violation of the Fifth Amendment.

The writ should issue.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

No. 80-3262
No. 80-3585

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MINNESOTA MINING AND MANUFACTURING COMPANY,

Plaintiff-Appellant,
Plaintiff-Cross-Appellee,

v.

WALTER S. BLUME and THE EYECTRODYNE COMPANY, INC.,

Defendants-Appellees,
Defendants-Cross-Appellants.

ORDER

(Filed December 23, 1982)

Before: BROWN* and JONES, Circuit Judges, and WHITE**, District Judge.

* Judge Brown retired from regular active service under the provisions of 28 U.S.C. Section 371(b) on June 16, 1982, and became a Senior Circuit Judge.

** The Honorable George W. White, United States District Court for the Northern District of Ohio, sitting by designation.

Upon consideration of the order entered by the court on December 15, 1982, it is noted that it was erroneously stated therein that the movants had accompanied their petition for a rehearing with a suggestion for rehearing en banc.

The petition was referred to the panel which heard the case. Having noted nothing of substance in that motion for rehearing which had not been carefully considered before issuance of the court's order,

It is therefore ORDERED that the motion for rehearing, be, and it hereby is, denied.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN,
Clerk